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In the Supreme Court of the United States

OCTOBER TERM, 1980

WAYNE A. STANTON, INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE INDIANA DEPARTMENT OF PUBLIC WELFARE, PETITIONER

v.

ELIZABETH BROWN AND JAMES BROWN, BY HIS NEXT FRIEND, MICHAEL BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Medicaid Act permits a participating state to consider the available income of an applicant's spouse, whether or not actually contributed to the applicant, in determining the applicant's eligibility for medical assistance and the amount of assistance to which the applicant is entitled.[1]

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[1] The United States expresses no opinion concerning the attorneys' fee issue raised in the petition.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	7
Conclusion	13

TABLE OF AUTHORITIES

Cases:	
Batterton v. *Francis*, 432 U.S. 416	11
Franssen v. *Juras*, 406 F. Supp. 1375	8
Gray Panthers v. *Administrator, Health Care Financing Administration*, No. 79-1334 (D.C. Cir. July 29, 1980)	8
Harris v. *McRae*, No. 79-1268 (June 30, 1980)	1
Herweg v. *Ray*, 443 F. Supp. 1315, aff'd, 619 F.2d 1265, petition for cert. pending, No. 80-60 (filed July 14, 1980)	5, 7-8
Norman v. *St. Clair*, 610 F.2d 1228, petition for cert. pending *sub. nom. Harris* v. *Norman*, No. 80-498 (filed Sept. 27, 1980)	7, 8, 9
Constitution, statutes and regulations:	
United States Constitution, Fourteenth Amendment, Equal Protection Clause	5
Social Security Act, 42 U.S.C. 301 *et seq.*:	
Title I, 42 U.S.C. (1970 ed.) 301 *et seq.*	1
Title IV, 42 U.S.C. (1970 ed.) 601 *et seq.*	1
Title X, 42 U.S.C. (1970 ed.) 1201 *et seq.*	1
Title XIV, 42 U.S.C. (1970 ed.) 1351 *et seq.*	1
Title XVI, 42 U.S.C. 1381 *et seq.*	2
42 U.S.C. 1382(a)(2)	3
42 U.S.C. 1382c(b)	3
42 U.S.C. 1382c(f)(1)	3
Title XIX, 42 U.S.C. 1396 *et seq.*	1
42 U.S.C. 1396a(a)(10)(A)	3, 12
42 U.S.C. 1396a(A)(10)(C)	12

Constitution, statutes and regulations—Continued: Page

42 U.S.C. 1396a(a)(17) 1, 4, 5, 6, 7, 8, 9, 10, 11, 12
42 U.S.C. 1396a(a)(17)(D) 2, 9
42 U.S.C. 1396a(f) 3, 4, 7, 9, 12
Social Security Amendments of 1972, Pub. L. No. 92-603, Section 209(b), 86 Stat. 1381 . 3, 4, 7, 8, 9, 11, 12, 13
42 U.S.C. 1988 5
42 C.F.R. 435.723 ..... 4, 10
42 C.F.R. 435.734 ..... 4, 10

Miscellaneous:

40 Fed. Reg. 60074 (1975) 4
H.R. Rep. No. 213, 89th Cong., 1st Sess. (1965) 2, 10
S. Rep. No. 404, 89th Cong., 1st Sess. (1965) ...1, 2, 10
S. Rep. No. 92-1230, 92d Cong., 2d Sess. (1972) 4, 12
S. Rep. No. 93-553, 93d Cong., 1st Sess. (1973) 12

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

The Medicaid program was established in Title XIX of the Social Security Act, 42 U.S.C. 1396 *et seq.*, "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, No. 79-1268 (June 30, 1980), slip op. 1-2. As adopted in 1965, Title XIX required participating states to provide medical assistance to individuals who received cash assistance under any of the four "categorically needy" assistance programs established in the Social Security Act.[2] Under Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), each participating state was required to adopt "reasonable standards * * * for determining eligibility for and the extent of medical assistance," taking into account "only such income and resources as are * * * available to the applicant or recipient." Furthermore, in response to practices that had been adopted by states in administering the medical assistance plans established under the predecessor Kerr-Mills program, Congress required participating states to refrain from taking into account "the financial responsibility of any individual for any applicant or recipient of assistance * * * *unless such applicant or recipient is such*

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[2] Old Age Assistance (OAA), Title I, 42 U.S.C. (1970 ed.) 301 *et seq.*; Aid to Families with Dependent Children (AFDC), Title IV, 42 U.S.C. (1970 ed.) 601 *et seq.*; Aid to the Blind (AB), Title X, 42 U.S.C. (1970 ed.) 1201 *et seq.*; Aid to the Permanently and Totally Disabled (APTD), Title XIV, 42 U.S.C. (1970 ed.) 1351 *et seq.* Participating states could also establish "medically needy" programs under which they would offer medical assistance to individuals whose income was greater than permissible under the categorical assistance plans but inadequate to pay medical expenses. Congress thought it appropriate, however, that the medical expenses of the "most needy" be met before extending benefits to the less needy. See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77 (1965).

individual's spouse" or minor, blind, or disabled child. 42 U.S.C. 1396a(a)(17)(D) (emphasis added).

With the approval of the Secretary of Health, Education, and Welfare (now Health and Human Services), some participating states took the position that it was reasonable to expect an applicant's spouse to help pay the cost of the applicant's medical expenses and, therefore, adopted rules that took into account the income of the spouse in determining Medicaid eligibility and the amount of assistance. These states calculated an amount considered necessary to pay the basic living expenses of the applicant's spouse and "deemed" any income of the spouse in excess of that amount as "available" to the applicant. In accordance with Congress' expressed intent that the medical expenses of the "most needy" be met first under the Medicaid program,[3] the amount considered necessary to pay the basic living expenses of the applicant's spouse was set near subsistence level.

In 1972, Congress replaced three of the four categorical assistance programs with a new federal program, Supplemental Security Income for the Aged, Blind, and Disabled (SSI), Title XVI, 42 U.S.C. 1381 *et seq.*[4] From the beginning of the Medicaid program in 1965, participating states were required to provide medical assistance to those individuals receiving benefits under their categorical assistance programs. Adoption of the SSI program was not intended to affect this traditional linkage. But under the SSI program, the states would no longer control the standards of need for the aged, blind, or disabled. Furthermore, the group of individuals who would be eligible for SSI assistance, and therefore eligible for Medicaid assistance, was in some cases significantly larger than the group that was eligible under the prior assistance programs for the aged, blind, and disabled. To avoid forcing the states that participated in the Medicaid program to choose among (1) ex-

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[3] See, *e.g.*, S. Rep. No. 404, 89th Cong., 1st Sess. 77, 78–79 (1965); H.R. Rep. No. 213, 89th Cong., 1st Sess. 66, 68 (1965).

[4] As its name indicates, the SSI program replaced the categorical assistance plans for the aged, blind, and disabled.

panding their Medicaid assistance obligations involuntarily, (2) withdrawing from the Medicaid program, or (3) reducing the level of benefits provided under the Medicaid program, Congress offered the states what has come to be called the "209(b) option," 42 U.S.C. 1396a(f).[5] Under Section 1902(a)(10)(A) of the Act, 42 U.S.C. 1396a(a)(10)(A), all participating states are required to provide medical assistance to any person receiving cash assistance under the SSI program. But pursuant to the "209(b) option" a state may deny medical assistance to any person who, although eligible under the SSI program, would not have been eligible for assistance under the state's Medicaid plan in effect on January 1, 1972.

Under the SSI statute, the income of an applicant's spouse is attributed to the applicant for the purpose of determining eligibility and the amount of assistance.[6] Any state that participates in the Medicaid program but fails to exercise the 209(b) option (an "SSI state") is required to provide medical assistance to all SSI benefit recipients. To avoid the unfairness and administrative difficulties involved in permitting individual SSI states to determine Medicaid eligibility by reference to rules different from those applied in determining SSI eligibility, the Secretary issued regulations requiring SSI states, in making Medicaid determinations, to consider the income of an ap-

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[5] The provision was enacted as Section 209(b) of the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1381.

[6] When the applicant and his spouse live in the same household, the income of both is considered in determining the eligibility of either for SSI benefits. 42 U.S.C. 1382(a)(2), 1382c(b), (f)(1). When the applicant and his spouse cease to share the same household, the income of the applicant's spouse is no longer considered in determining the applicant's eligibility for SSI benefits, unless the applicant's spouse is an "eligible spouse," as defined in 42 U.S.C. 1382c(b). Because of the definition of "eligible spouse," no one can remain an "eligible spouse" for more than six months after separation from his spouse. 42 U.S.C. 1382c(b).

plicant's spouse only to the extent required by the SSI statute. 42 C.F.R. 435.723.[7]

In addition, the Secretary required states that exercised the 209(b) option to consider the income of an applicant's spouse in determining Medicaid eligibility and the level of benefits at least to the extent that it would be considered in a SSI state.[8] 42 C.F.R. 435.734. Section 209(b) of the 1972 amendments, 42 U.S.C. 1396a(f), however, authorized the states that exercised the option to apply the more restrictive eligibility standards of their 1972 Medicaid programs. Therefore, the Secretary determined that it would be appropriate to allow Section 209(b) states to consider the income of an applicant's spouse to the extent they would have done so under their 1972 Medicaid plans. 42 C.F.R. 435.734.

2. Respondents, on behalf of themselves and others similarly situated, brought suit in the United States District Court for the Southern District of Indiana, challenging the Medicaid deeming practices of Indiana, a 209(b)

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[7] For example, without such regulations, if an applicant became eligible for and received SSI benefits because his noneligible spouse no longer lived in his home and therefore her income was not attributed to him, he would be eligible for Medicaid benefits in an SSI state. But if the same individual were unwilling to accept SSI benefits and applied directly to the state Medicaid agency for benefits under a program for the "medically needy" with higher income standards, he might nevertheless be denied medical assistance if the state Medicaid rules continued to take into account the income of his spouse. This discrimination between needy individuals and equally needy individuals who, for their own reasons, are unwilling to accept SSI benefits clearly was not intended by Congress. See 40 Fed. Reg. 60074 (1975).

[8] If, in SSI states, the term "available" income, as used in 42 U.S.C. 1396a(a)(17), now included the income of an applicant's spouse to the extent required by the SSI statute, the Secretary reasoned that the term should be interpreted in the same manner in 209(b) states. Moreover, the 209(b) option was only intended to allow participating states to avoid expanded Medicaid obligations because of the more liberal eligibility criteria of the SSI statute. It was not intended to permit participating states to receive federal assistance for the purpose of providing medical assistance to individuals who were ineligible even under the SSI criteria. See S. Rep. No. 92-1230, 92d Cong., 2d Sess. 222 (1972).

state, as inconsistent with the requirements of Section 1902(a)(17) of the Social Security Act, 42 U.S.C. 1396a(a)(17), and the Equal Protection Clause of the Fourteenth Amendment.[9] Finding the statutory contention dispositive, the district court did not reach respondents' constitutional claims (Pet. App. 21–A). The district court held (Pet. App. 25–A) that under Section 1902(a)(17) Indiana cannot use a formula for determining what part of the income and resources of an applicant's spouse is "available" to the applicant, but must instead make individualized factual determinations in each case, giving "'due consideration to the individual obligations and the particular needs of each spouse and family,'" quoting *Herweg* v. *Ray*, 443 F. Supp. 1315, 1319 (S.D. Iowa 1978), aff'd by an equally divided court, 619 F.2d 1265 (8th Cir. 1980), petition for cert. pending, No. 80–60 (filed July 14, 1980). The district court did not reach respondents' additional contention that under Section 1902(a)(17) a participating state could not consider a spouse's income as "available" to the applicant if he refused to contribute to the applicant's medical care.[10]

Respondents sought review of the district court decision, arguing that it did not go far enough in requiring compliance with Section 1902(a)(17).[11] The court of appeals agreed with the district court that Section 1902(a)(17) requires participating states to make individualized factual

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[9] The district court certified a class comprised of "all named institutionalized persons who have been, are or will be recipients of the Indiana Medicaid Program and their non-institutionalized spouses who have or will have their incomes and resources 'deemed' available to said institutionalized spouses by Indiana State Department of Public Welfare Regulation 2-214 * * *" (Pet. App. 18–A).

[10] The district court denied respondents' request for attorneys' fees under 42 U.S.C. 1988 (Pet. App. 25–A to 26–A).

[11] Respondents also argued that the district court had abused its discretion in denying attorneys' fees. Petitioner did not cross-appeal and therefore did not challenge the district court's holding that Section 1902(a)(17) requires participating states to conduct individualized factual inquiries to determine what part of the income of an applicant's spouse is "available."

determinations as to how much of the income of an applicant's spouse is "available" for purposes of evaluating medicaid eligibility and the amount of assistance to which an institutionalized applicant is entitled (Pet. App. 5-A). But the court of appeals held that Section 1902(a)(17) also requires participating states to ignore the amount determined to be "available" from the spouse, unless the money is actually contributed. According to the court of appeals, Indiana could seek to recoup the amount determined to be available by filing a lawsuit (presumably under state law) against the non-contributing spouse (Pet. App. 11-A):

> In light of the Indiana spousal support statute, * * * we hold that the state welfare agency is required to make an upward adjustment in Medicaid benefits to compensate for the portion left unpaid by an unwilling spouse, and then to proceed under the above statute to seek reimbursement directly from the unwilling spouse.

The court of appeals also held that respondents were entitled to attorneys' fees and remanded the issue to the district court for further consideration (Pet. App. 16-A to 17-A).

Judge Pell dissented in part from the court's construction of the Medicaid Act. Judge Pell agreed that a state may not "deem" the income of an applicant's spouse without making an individualized determination of need, but he disputed the court's holding that the state must pay *all* the medical expenses of a Medicaid applicant even if he has a spouse able but unwilling to pay part of those expenses. Judge Pell remarked (Pet. App. 17-A):

> I think it unrealistic to think that the state will engage in a multiplicity of continuing individual lawsuits to recover money that it should not have had to pay out in the first place. Under the majority opinion, there is an open invitation for the spouse to decide that he or she does not wish to make the * * * payment. In this era of inflation, and giving consideration to the human inclination not to pay out money when one doesn't have to, I think it reasonable to conclude that few would decline the invitation.

DISCUSSION

1. The holding of the court of appeals in this case directly conflicts with the holding of the Fifth Circuit in *Norman* v. *St. Clair*, 610 F.2d 1228 (1980), petition for cert. pending *sub nom. Harris* v. *Norman*, No. 80-498 (filed Sept. 27, 1980). In *Norman*, the Fifth Circuit concluded that the language and legislative history of Section 1902(a)(17) of the Act, 42 U.S.C. 1396a(a)(17), indicates that "Congress intended that income deemed from a spouse to be a part of the 'available' income which the state may consider in determining [Medicaid] eligibility." 610 F.2d at 1237.[12] The Fifth Circuit specifically rejected the interpretation of Section 1902(a)(17) adopted by the Seventh Circuit in this case:

> We must reject plaintiffs' contention that 42 U.S.C. § 1396a(a)(17)(D) merely authorizes the states to invoke formal financial responsibility proceedings for the support of spouses. We hold instead that 42 U.S.C. § 1396a(a)(17)(D) permits states to deem income from one spouse available to the other and that such deemed income is part of the "available" income which states may compute under 42 U.S.C. § 1396a(a)(17)(B).

610 F.2d at 1237. Nothing in Section 1902(a)(17) requires a participating state to ignore the income of an applicant's spouse in determining eligibility for or the amount of Medicaid assistance or limits the state's remedies to a recoupment lawsuit against the unwilling spouse.

Similarly, the Seventh Circuit's decision conflicts with the Eighth Circuit's judgment in *Herweg* v. *Ray*, 619 F.2d 1265 (1980), aff'g by an equally divided court 443 F.Supp.

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[12] In *Harris* v. *Norman*, No. 80-498, the Secretary of Health and Human Services seeks review of the Fifth Circuit's additional holding that Section 1902(a)(17) requires participating states to incorporate a "flexible means" test in determining what part of the income of an applicant's spouse is "available" to the applicant for purposes of determining Medicaid eligibility and the amount of assistance, notwithstanding the provisions of 42 U.S.C. 1396a(f)—the 209(b) option—and the Secretary's regulations that do not require a "flexible means" test.

1315 (S.D. Iowa 1978), petition for cert. pending, No. 80-60 (filed July 14, 1980).[13] Although erroneously holding that Section 1902(a)(17) requires SSI states to make individualized determinations as to how much of the income of an applicant's spouse is "in fact reasonably available for the support of the institutionalized spouse," 443 F. Supp. at 1319, the district court decision, affirmed by the Eighth Circuit, makes plain that the provision was not "'intended to permit one spouse to spurn a normal obligation to support and assist the other merely by refusing to make contributions.'" *Ibid.*, quoting *Franssen* v. *Juras*, 406 F. Supp. 1375, 1378 (D. Ore. 1975).[14]

The Seventh Circuit's decision does not conflict with the holding in *Gray Panthers* v. *Administrator, Health Care Financing Administration*, No. 79-1334 (D.C. Cir. July 29, 1980). It is, however, inconsistent with the D.C. Circuit's conclusion that the legislative history of the Medicaid statute "establishes a broad principle, or expectation, that 'deeming' is appropriate between spouses * * *." Slip op. 11.[15]

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[13] The petition for certiorari in *Herweg* seeks review of the district court's further holding that SSI states such as Iowa may consider the income of an applicant's spouse for Medicaid purposes even in circumstances where the income would not be considered in making SSI eligibility determinations.

[14] Although respondents contend (Br. in Opp. 7-8) that *Herweg* is distinguishable because Iowa is an SSI state, they then seem to concede that the Eighth Circuit's affirmance of the district court's judgment is contrary to the decision of the Seventh Circuit on the question of whether a state must (i) ignore the income of a spouse in determining Medicaid eligibility or the amount of assistance and (ii) later attempt to recoup the amount found to have been overpaid (see *id.* at 8). Since Section 1902(a)(17) governs the standards for Medicaid eligibility in both 209(b) states and SSI states, Iowa's status as an SSI state is irrelevant for these purposes.

[15] The D.C. Circuit erroneously went on to hold, however, that in adopting the regulations applicable in 209(b) jurisdictions, the Secretary failed to consider several "relevant" factors and "policy concerns." Slip op. 14. The Solicitor General has authorized the filing of a petition for a writ of certiorari to challenge this holding.

The conflict between the holding of the Seventh Circuit and that of the Fifth Circuit in *Norman* v. *St. Clair* is clear, but each of the four recent court of appeals decisions discussed above is to some extent irreconcilable with the others. Each of these decisions is based, at least in part, on an interpretation of 42 U.S.C. 1396a(a)(17), one of the fundamental provisions governing Medicaid eligibility. The divergent interpretations of the courts of appeals have posed serious problems for the Secretary in supervising the administration of state Medicaid programs.

The Seventh Circuit's decision in this case is particularly egregious. First, it ignores the language of Section 1902(a)(17)(D) and imposes a wholly impractical and costly burden on the State of Indiana. Second, it disregards the Secretary's regulations and the terms of the Section 209(b) option, 42 U.S.C. 1396a(f). Indeed, the court of appeals decision in this case is fundamentally inconsistent with the statutory scheme Congress established and effectively *reverses* the intended effect of the 209(b) option. We believe that, in view of the conflict among the circuits and the importance of the issue presented, this Court should grant the petition for a writ of certiorari.

2. In light of the practices that arose in connection with the administration of the Kerr-Mills medical assistance plans, Congress prohibited the consideration of the financial responsibility or income of any Medicaid applicant's relative, except the applicant's spouse or parent. Section 1902(a)(17)(D) provides:

> A state plan for medical assistance must—include reasonable standards * * * for determining eligibility and the extent of medical assistance * * * [that] do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan *unless such applicant or recipient is such individual's spouse or such individual's child* * * *.

42 U.S.C. 1396a(a)(17)(D) (emphasis added). This provision specifically permits a participating state to take the income of an applicant's spouse into account in "determining eligibility and the extent of medical assistance." The

legislative history of the provision is equally clear: the House and Senate committees remarked that "it is proper to expect spouses to support each other and parents to be held accountable for the support of their * * * children * * *." H.R. Rep. No. 213, 89th Cong., 1st Sess. 68 (1965); S. Rep. No. 404, 89th Cong., 1st Sess. 78 (1965). Yet, the court of appeals has required Indiana to ignore the available income of an applicant's spouse in determining eligibility and the amount of assistance, whenever the spouse is unwilling to pay.

As Judge Pell pointed out in dissent, a great many spouses are likely to accept the invitation offered by the court's opinion. In the Secretary's view, the Medicaid Act does not require participating states to initiate countless costly and time-consuming lawsuits against spouses unwilling to contribute in order to recoup money they never should have been required to pay under the statute. Congress committed the federal government to give financial assistance to states that chose to provide medical assistance to needy individuals, but it left the determination of "need" largely to the discretion of the states. It cannot reasonably be asserted that Congress *implicitly required* the states to provide medical assistance to individuals who the states concluded were not "needy" and then to file a lawsuit to attempt to recover the money. In light of the intolerable burden on participating states and the strong disincentive for participation that would result from such a statutory scheme, there surely would have been some discussion of the issue if that had been Congress' intent.

3. Pursuant to authority expressly delegated in Section 1902(a)(17), the Secretary has adopted regulations interpreting the term "available" income to include the income of an applicant's spouse at least to the extent that it would be considered in determining eligibility under Title XVI of the Social Security Act (SSI). See 42 C.F.R. 435.723, 435.734.[16] These regulations must be given legislative ef-

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[16] The court of appeals notes (Pet. App. 8–A n.10) that Mrs. Brown (the applicant's spouse in this case) was not an "eligible spouse," as defined in the SSI statute. But see note 9, *supra*. The HHS regula-

fect. *Batterton* v. *Francis*, 432 U.S. 416, 425–426 (1977). A reviewing court is not free to ignore such regulations solely because it would have adopted a different interpretation of the statutory phrase. See *id.* at 425.

The Secretary's regulations are not arbitrary or capricious or otherwise contrary to law. The court of appeals did not find that the regulations are unlawful.[17] Rather, the court of appeals held that Section 1902(a)(17) requires the states to adopt the impractical and costly recoupment procedure described in the court's opinion. We submit that the court of appeals should have followed the Secretary's interpretation of the phrase "available" income and should not have imposed the additional requirement that the available money of an applicant's spouse be actually contributed.

The HHS regulations applicable in 209(b) jurisdictions are consistent with the provisions of Section 1902(a)(17) and further the intent of Congress in adopting 42 U.S.C. 1396a(f). Section 1902(a)(17) requires participating states to consider only "available" income, leaving to the Secretary the task of defining that term. The statute does not require the states to ignore available income in determining eligibility or the amount of assistance simply because the spouse is unwilling to contribute it. In accordance with the link between Medicaid eligibility and eligibility under the categorical assistance programs, and to avoid the unfairness and administrative difficulties involved in permitting the 35 SSI states to apply Medicaid criteria different from those used in determining SSI eligibility, the Secretary required all SSI states to use the SSI criteria for Medicaid purposes as well.

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tions, therefore, did not require Indiana to consider her income in determining Mr. Brown's eligibility, but permit Indiana to consider her income if it would have done so under its 1972 Medicaid plan. In any event, the court of appeals' interpretation of Section 1902(a)(17) is not limited by the status of the non-institutionalized spouse.

[17] Indeed, the regulations applicable in 209(b) states were not even mentioned in the court of appeals' decision, although the court noted the SSI regulations (Pet. App. 8-A).

Since Section 1902(a)(17) is no less applicable in SSI states than in 209(b) states, the Secretary reasonably determined that the term "available" income should be interpreted in a similar manner in 209(b) states. Furthermore, the 209(b) option was intended to permit participating states to exclude from coverage individuals who would be eligible under the SSI criteria, and therefore eligible for Medicaid coverage (see 42 U.S.C. 1396a (a)(10)(A)), but who would not have been eligible under the more restrictive standards of the 1972 state Medicaid plans. See S. Rep. No. 92-1230, 92d Cong., 2d Sess. 222 (1972). See also S. Rep. No. 93-553, 93d Cong., 1st Sess. 56 (1973). The purpose of the 209(b) option was to avoid imposing expanded Medicaid obligations on participating states, as a result of the more liberal SSI eligibility requirements. It was not intended to permit states to cover individuals who would not be eligible even under the more liberal SSI criteria.[18] Thus, in requiring 209(b) states to adopt the SSI standards for considering the income and resources of a Medicaid applicant's spouse but permitting those states to apply standards as restrictive as those found in their 1972 Medicaid plans, the Secretary's regulations are consistent with both Section 1902(a)(17) and Congress' intent in adopting 42 U.S.C. 1396a(f).

More generally, the Seventh Circuit's decision in this case is fundamentally inconsistent with the statutory scheme that Congress has established. From the outset, Congress has only required participating states to provide medical assistance to the "most needy." Initially, mandatory medical assistance was tied to receipt of cash benefits under one of the state-administered categorical assistance programs. When Congress enacted the federal SSI program to replace the state-administered programs for the aged, blind, and disabled, it maintained the linkage be-

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[18] If the states choose to adopt a "medically needy" program, see 42 U.S.C. 1396a(a)(10)(C), they will of course provide medical assistance to individuals who are not eligible under the SSI standards, but that was not the purpose of the 209(b) option, except to the extent that the "spend-down" clause of 42 U.S.C. 1396a(f) has that effect.

tween mandatory Medicaid coverage and receipt of benefits under a categorical assistance program. Yet, the decision of the Seventh Circuit requires Indiana to provide medical assistance to individuals without regard to whether they are the "most needy," as defined by either the SSI eligibility criteria or Indiana's 1972 Medicaid plan.[19] Instead, the Seventh Circuit effectively substitutes the willingness of an institutionalized individual's spouse to contribute as the test of "need." This decision is erroneous and warrants further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[19] As noted above, Indiana's status as a 209(b) state makes the court's decision wrong for a second reason. The purpose of 209(b) was to allow participating states to refuse to provide medical assistance to some individuals who receive SSI benefits. The decision of the court of appeals *requires* Indiana to provide medical assistance to individuals who may or may not be eligible under the SSI criteria.

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